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THE NEWSLETTER

Tribunal Need not be a Necessary Party in a Case Where Legality of its Order is Challenged

The Hon'ble Supreme Court ("**Court**") in the case of ***M.S. Kazi*** v. ***Muslim Education Society*** [Civil Appeal Nos. 11976-11977] decided on 22.08.2016 held that a tribunal need not be impleaded as a necessary party in Special Civil Applications under article 226 and article 227 of the Constitution of India ("**Constitution**") where the legality of the order passed by such tribunal is challenged. The appellant in the said case was an assistant teacher in a minority institution run by the respondent. On 25.06.2002, a charge sheet was issued to the appellant wherein it was alleged that he proceeded on a pilgrimage without prior permission and moreover, the leave application indicated Umrah whereas in the application for withdrawal of the provident fund, the reason stated was the Hajj. Upon conducting a departmental inquiry, the charges were proved and accordingly he was dismissed from the service. The Gujarat Higher Secondary School Education Tribunal ("**Tribunal**") dismissed the application filed by the appellant against the order of dismissal passed by the respondent. Aggrieved by the order of the Tribunal, the appellant filed a Special Civil Application before the Hon'ble High Court of Gujarat ("**High Court**"). The single bench of the High Court dismissed the application and thus, the appellant filed an appeal against the order of the High Court comprising a single bench before the division bench of the High Court. The appeal was dismissed by the division bench as well and it was held hat the application was not maintainable as the court or tribunal whose order was impugned was not made a party. The appellant then preferred an appeal before the Hon'ble Supreme Court. The Court ultimately held that the order of tribunal is treated as a judicial review and therefore, the same need not be defended by the Tribunal when such order of the Tribunal is challenged under Article 226 and Article 227 of the Constitution. Therefore, it is not necessary to make the tribunal a party to the proceedings in a special civil application where such application is filed to challenge the order of the Tribunal. The Court restored the matter to the High Court to be adjudicated on merits.

Finally a Law to Regulate Surrogacy in India !!

With the intention to regulate the surrogacy business in India which estimates upto Rs. 900 crore and to prevent commercialisation of surrogacy and exploitation of surrogate mothers and surrogate children, the Union Cabinet has passed the Surrogacy (Regulation) Bill, 2016 ("**Bill**") on

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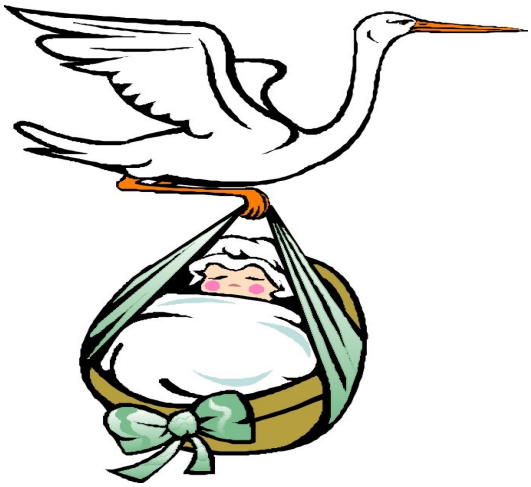
24.08.2016. The Bill legalises altruistic surrogacy (i.e. ethical surrogacy) in India and puts a complete ban on commercial surrogacy. The proposed Bill is now expected to be introduced in the Parliament.

As per the Bill, surrogacy will be allowed only when the following conditions are fulfilled:

1. Only altruistic surrogacy and not commercial surrogacy will be allowed;
2. The intending couple has been married for at least 5 years and are Indian citizens;
3. Either or both of the intending couple is/are suffering from proven infertility;
4. The age of intending couple shall be (i) for male – 26 years to 55 years and (ii) for female – 23 years to 50 years;



5. The intending couple shall not have any surviving biological child or a child through adoption or surrogacy earlier. Provided, if the said child is mentally or physically challenged or suffers from lifetime disorder or fatal illness, then the parents of such child can opt for surrogacy.
6. The female who agrees to be a surrogate mother should be a "close relative" of the intending couple.
7. The female being a surrogate mother in past cannot be a surrogate mother again. The intending couple can opt for surrogacy only once in their life time.
8. The intending couple shall not abandon the child born out of surrogacy under any condition.
9. Only those Assisted Reproductive Technology clinics which are registered under the surrogacy law, shall be authorised to carry out surrogacy; and
10. Single persons, those that have divorced, live-in couples and homosexuals cannot have children from surrogacy.

The Bill also provides for Surrogacy Regulatory Bodies (as defined in the Bill) which would be established at the Central and the State level to regulate cases related to surrogacy and to ensure proper implementation of the surrogacy law. Further, the Bill has also prescribed hefty punishments in the form of fine and imprisonment for violation of the provisions of the Bill.

High Court allows Women's Entry into Haji Ali Inner Sanctum

On 26.08.2016, the division bench of the Bombay High Court ("**Court**") pronounced a landmark judgment ***Dr. Noorejahan Safia Naz & Ors.*** v. ***Haji Ali Dargah Trust & Ors.*** [Public Interest Litigation No.106 of

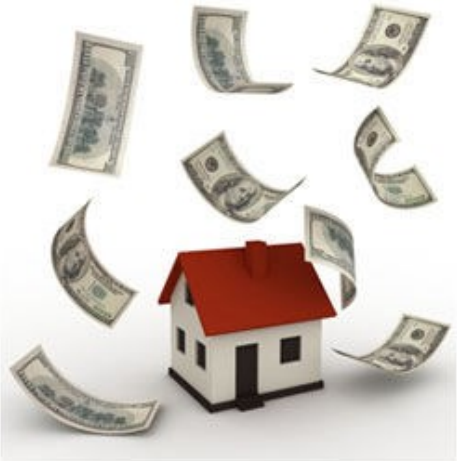
2014]. The Court held that the ban on the entry of women in the Sanctum Sanctorum at the famous Haji Ali Dargah ("**Dargah**") is violative of Article 14 (Equality before Law), Article 15 (Prohibition of Discrimination on ground of religion, race, caste, sex or place of birth) and Article 25 (Freedom of conscience and free profession, practice and propagation of religion) of the Constitution of India ("**Constitution**").

The Haji Ali Trust ("**Trust**") had restricted the entry of women in the mazzar area of the Dargah since year 2012. The Trust defended the restrictions imposed by them on the ground that allowing women to enter the sanctum sanctorum was against the Sharia law and if the restriction is waived, it will jeopardize the safety of women.

Also, the Trust contended that under Article 26 of the Constitution they had the freedom to manage their religious affairs. The Court ruled that the Trust is a public charitable trust. It is open to people all over the world, irrespective of their caste, creed or sex, etc. Once a public character is attached to a place of worship, all the rigors of Articles 14, 15 and 25 would come into play and the Trust cannot justify its decision by misreading the content of Article 26 of the Constitution. The Trust has no right to discriminate and prohibit entry of women into a public place of worship under the guise of 'managing the affairs of religion' under Article 26 of the Constitution. The Court further held that it is also the duty of the State Government to ensure the safety and security of women at such places. This judgment definitely protects the right of women to access religious places at par with men, however, it has been stayed by six weeks to allow for an appeal to the Supreme Court of India.

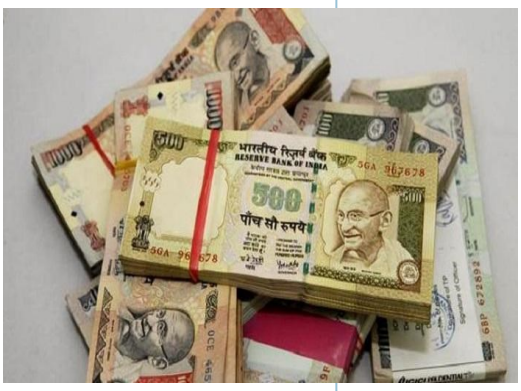
Rental Income as main Business to be charged as Business Income

The Hon'ble Supreme Court ("**Court**") in ***M/s. Rayala Corporation Pvt. Ltd.*** v. ***Assistant Commissioner of Income Tax*** [Civil Appeal No.6437 of 2016 with Civil Appeals Nos. 6438, 6439, 6440, 6441 respectively of 2016] decided on 11.08.2016 set aside the judgment of High Court of Madras ("High Court") and held that the income from leasing of housing properties shall be treated as business income if business of the company is to lease its housing property and to earn rent therefrom As per the memorandum of association, the business of the appellant is to deal with real estate and also to earn income by way of leasing the housing properties belonging to the appellant. The Appellant had stopped its other business activities and was carrying out an activity of leasing and carrying out an activity of leasing and earning lease therefrom. Earlier, the High Court, in this case, held that that the income



earned by the appellant by way of renting of housing property should be treated as 'Income from House Property' as leasing and letting out of shops and properties was not the main business of the appellant as per their memorandum of association. The Court observed that the appellant company had only one business and that was of leasing its property and earning rent therefrom. The Hon'ble Supreme Court has relied upon the judgment of ***Chennai Properties and Investments Ltd.*** v. ***Commissioner of Income Tax*** [2015] 373 ITR 673 (SC) in which it was held that if an assessee is having his house property and by way of business he is giving the property on rent and if he is receiving rent from the said property as his business income, the said income, even if in the nature of rent, should be treated as 'Business Income' because the assessee is having a business of renting his property and the rent which he receives is in the nature of his business income.

Payment of Tax on Undisclosed Income in Cash



The Income Declaration Scheme, 2016 ("**Scheme**") came into effect on 01.06.2016. To address doubts and concerns raised by the stakeholders, the Central Board of Direct Taxes ("**CBDT**") has issued several sets of FAQs *via* circulars. In order to address further queries received from the public relating to the Scheme, CBDT, *vide* circular no. 29 of 2016, have clarified several other issues related to the Scheme. One of the issues which has been clarified is that the payment of tax on the amount disclosed under the Scheme can be made in cash & for the same Reserve Bank of India has been requested to issue necessary instructions to the banks. Further, it is clarified that cash deposit made by the taxpayer consequent to the declaration made under the Scheme will not entail any adverse action against such tax payer by the Financial Intelligence Unit or the Income Tax Department solely on the basis of the information with respect to cash deposit made consequent to the declaration under the Scheme. The Scheme came into effect on 01.06.2016 and will end on 30.09.2016 is a step by the government to give tax evader a chance to come out clean without the arduous procedures. The move to allow deposit of tax in cash reiterates the principle on which the Scheme was launched, that is, curbing the black money menace.

Blanket Ban on Arbitration of Trust Disputes

The Supreme Court of India ("**Court**") in ***Shri Vimal Kishor*** v. ***Mr. Jayesh Dinesh Shah*** (Civil Appeal No. 8164 of 2016), held that disputes relating to the trust, trustees and the beneficiaries arising out of the trust deed under the Indian Trusts Act, 1882 ("**Act**") are not capable of being decided by the arbitrator despite of the existence of arbitration agreement to that effect between the parties. The question involved was whether clause in a trust deed, which provides for resolving the disputes arising between the beneficiaries of the trust

through arbitration, can constitute an 'arbitration agreement' within the meaning of section 2(b) and 2(h) read with section 7 of the Arbitration & Conciliation Act, 1996 ("**Arbitration Act**") and whether the application filed by the respondents under section 11 of the Arbitration Act can be held as maintainable. The Court opined that in order to constitute a valid, binding and enforceable arbitration agreement, the requirements contained in section 7 of the Arbitration Act have to be satisfied. In cases where conditions under section 7 of the Arbitration Act are not satisfied then it would render the arbitration agreement invalid and unenforceable thereby resulting into dismissal of the application filed under section 11 of the Arbitration Act. The Court stated that there is always a proposal and its acceptance in case of every agreement but the same is not required in the case of creation of a trust because the trustee and the beneficiary though accept creation of a trust but by such acceptance, they merely undertake to carry out the terms mentioned in the trust deed. Further, the Court ruled that since the purpose of an arbitration agreement is to oust the jurisdiction of courts therefore, such agreements should be strictly construed. And as the Act is a complete code in itself, it provides a comprehensive machinery for dealing with all issues relating to the trust, trustees and the beneficiaries and provides for adequate and sufficient remedies to all aggrieved persons by giving them a right to approach the civil court of original jurisdiction for redressal of their disputes Therefore, there exists an implied bar of exclusion on applicability of the Arbitration Act for deciding the disputes relating to trust, trustees and the beneficiaries through private arbitration. Such disputes are to be decided by the civil court in accordance with the provisions of the Act. Thus, the disputes arising out of a trust deed are not capable of being resolved through arbitration.

Whether Service Tax is Payable on Real Estate Activities?

- By CA Rahul Lakhwani, Senior Associate

INTRODUCTION

The judgement delivered by the Hon'ble Delhi High Court ("**Court**") in the case of ***Suresh Kumar Bansal and Ors.*** v ***Union of India and Ors.***[(W.P. (C) 2235 and 2971/2011)] decided on 03.06.2016 has come as a sign of relief to many home buyers and as a problem for the builders. The Court held that service tax shall not be applicable on buying flats or apartments that are under construction because the Finance Act, 1994 ("**Act**") and rules made thereunder do not provide any machinery provision for determining value of services provided by the builder for construction of flats. The legislature cannot levy tax on the sale of goods and immovable property being made while there is a sale of unit by a builder to a buyer. The Court held that the service tax is only payable on the value of services and not on the value of land. The mechanism for ascertaining the value of services (by excluding the value of land and goods supplied) involved in such contracts should have been provided either in the Act or the rules thereunder. In absence of any mechanism within the Act and/or in the said rules to exclude the value of land, no

service tax can be imposed on consideration of under construction flats wherein the value of land is included in such consideration. The Court further held that even though an abatement of 75% is given by a notification, it cannot substitute the lack of statutory machinery provisions in the Act or rules framed in this regard. Considering the above, the Court directed the revenue department to refund any amount which has been deposited to it by the builders to the petitioner allottee along with an interest of 6% from the date of deposit till the date of refund.

Further, the National Consumer Dispute Redressal Commission, New Delhi ("**NCDRC**") in the matter of ***Sunrise Green Residents Welfare Association*** v. ***Jaipuria Infrastructure Developers Pvt. Ltd.*** [(Consumer Case No. 142 of 2009)] decided on 22.08.2016 relied upon the matter of Suresh Kumar Bansal (*supra*) and directed the builder to file a refund application before the revenue authorities within a period of 6 weeks with respect to refund of the amount of service tax which the builder has collected as reimbursement of the service tax from the flat buyers. The NCDRC also directed the consumers to become a party while filing refund application in case the tax has been deposited with the department by way of CENVAT Credit of service tax. Further, relying on the judgement delivered by Court in Suresh Kumar Bansal (*supra*), directed the builder to apply to the Department of Service Tax, Government of India, within 6 weeks, for refund of the amount of service tax which the builder has collected as reimbursement of service tax from the flat buyers. On further prayer by the builder, that the payment of service tax was made after availing the CENVAT Credit of service tax paid to contractors, whom the builder has employed for the execution of construction work, the NCDRC directed that flat buyers should also join for seeking refund. The NCDRC also directed that in case any amount has been recovered by the developer from allottees, but the same has not been paid to the government, then in such case the builder shall be liable for penal consequences.

THE HC JUDGMENT & THE PRESENT LAW- APPLICABILITY

The provisions challenged in the matter of Suresh Kumar Basal (*supra*) were related to a period prior to July, 2012. From July 2012, a radical change was introduced in service tax wherein all services, except certain services specified in the Negative List, were subjected to service tax. However, even from July 2012 and till date, the Act and the rules pertaining to service tax do not contain any provision for exclusion of value of land. An abatement is provided vide a notification and therefore, the legal situation from July 2012 till date is exactly same as was there in the above judgment. Thus, by drawing analogy from the above judgment, from July 2012 onwards, no service tax was payable on the under construction flats where the consideration for such flats included the value of land.

FUTURE COURSE

It is likely that the Central Government will file an appeal before the Hon'ble Supreme Court challenging the judgement delivered by the Hon'ble High Court of Delhi in case of Suresh Kumar Bansal (*supra*). If the Hon'ble Supreme Court stays the order passed in the said case, the ruling in the said case will not have any operation. As on date, any update with respect to Suresh Kumar Bansal (*supra*) case is not available on website of Hon'ble Supreme Court. Till the time stay is not granted by Hon'ble Supreme Court or any contrary ruling is given by any other High Court, the current ruling is law of the land and accordingly, relief can be claimed by the stakeholders.

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